No. 76-1159

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

ARTHUR F. QUERN, ACTING DIRECTOR, ILLINOIS DEPARTMENT OF PUBLIC AID and successor in office to JAMES L. TRAINOR and THE ILLINOIS DEPARTMENT OF PUBLIC AID, ET AL.,

Petitioners,

vs.

VENUS MANDLEY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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vs.

VENUS MANDLEY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, ARTHUR F. QUERN, Acting Director of the Illinois Department of Public Aid and the ILLINOIS DEPARTMENT OF PUBLIC AID, respectfully pray that a Writ of Certiorari issue to review the Order and Opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 23, 1976.

OPINIONS BELOW

The Opinion of the United States District Court, Northern District of Illinois, Eastern Division, the Opinion of the United States Court of Appeals for the Seventh Circuit in case No. 76-1865 and the Order entered on November 29, 1976, by the United States District Court pursuant to the mandate of the United States Court of Appeals for the Seventh Circuit are not reported, and hence appear in the appendix hereto.

QUESTIONS PRESENTED FOR REVIEW

1. Is a state prohibited from affording any federally funded assistance for emergent needs to AFDC recipients unless the state elects to maintain a 42 U.S.C. §606(e) emergency assistance plan?

2. If a state elects to maintain a 42 U.S.C. §606 emergency assistance plan, is the state permitted to choose what types of destitution it will alleviate or must it provide relief for all types of destitution for all needy children and their families?

3. If a state elects to maintain a 42 U.S.C. §606(e) emergency assistance plan, must it provide assistance within 24 hours in all cases even where verification is impossible or the need not immediate?

STATUTES AND REGULATIONS INVOLVED

Chapter 28 U.S.C. §1254
Chapter 42 U.S.C. §1983
Chapter 42 U.S.C. §601
Chapter 42 U.S.C. §602
Chapter 42 U.S.C. §603(a)(1)
Chapter 42 U.S.C. §603(a)(5)
Chapter 42 U.S.C. §606(e)
45 C.F.R. §233.10(a)(1)(ii)
45 C.F.R. §233.20(a)(2)(v)
45 C.F.R. §233.120(a)(5), (b)(3)

JURISDICTION

The order and opinion of the United States Court of Appeals for the Seventh Circuit were entered on November 23, 1976. This Petition for Certiorari was filed within 90 days of the date of the entry of that Order.[1] This Court's jurisdiction is involved under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Petitioners, Defendants below, promulgated a revised Emergency Assistance Program on October 1, 1973, pursuant to 42 U.S.C. §606(e). The program was further revised and received approval from the United States Department of Health, Education and Welfare (H.E.W.) in

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[1] On January 28, 1977, pursuant to a Petition of Joseph Califano for an Application for a Stay of the Judgment of the United States District Court for the Northern District of Illinois pending disposition of the case by this Court, the Honorable John Paul Stevens, Associate Justice of the Supreme Court of the United States ordered that the mandate of the United States Court of Appeals for the Seventh Circuit, in case No. 76-1865, be recalled and stayed to and including February 18, 1977. Sup. Ct. A-619.

June, 1974. The program both as originally promulgated and as revised was challenged by the Respondents, Plaintiffs below, as being violative of the Equal Protection Clause, and certain statutory provisions of the Social Security Act and regulations promulgated thereunder.

This Illinois program had provided assistance for certain specified emergency needs to all people who were otherwise eligible for the Aid to Families with Dependent Children Program (A.F.D.C.) 42 U.S.C. §601 *et seq.* The primary aim of the then Illinois plan was to alleviate homelessness which occurred as a result of four emergency situations. The primary thrust of Respondents' complaint was that the plan violated the Equal Protection Clause because it provided emergency assistance to individuals in the four emergency situations, but did not provide assistance to individuals who experienced emergency situations other than the four situations set forth in the plan. Further, Respondents claimed that the State of Illinois was not delivering assistance "forthwith" as required by 45 C.F.R. §233.120. The District Court, after a bench trial, ruled on November 21, 1974, that the revised Emergency Assistance plan was valid under 42 U.S.C. 606(e) and the Equal Protection Clause, but ordered Illinois to amend the program to speed up delivery of the assistance. A final order was entered by the Court on March 14, 1975, directing the Petitioners to alter the assistance delivery system. On subsequent appeal from the two Orders, the United States Court of Appeals for the Seventh Circuit found the Illinois program in conflict with the Social Security Act and therefore invalid by virtue of the supremacy clause of the Constitution. The Court concluded that the Illinois plan was not consonant with the eligibility requirements of §606(e), 523 F.2d. 415 (1975) (*Mandley I*).

On remand the Petitioners informed the District Court that they were unsure as to how next to proceed. However,

in June of 1976, Petitioners informed the Court that they were not going to seek or receive funds pursuant to 42 U.S.C. 606(e) and 603(a)(5) and that they had exercised their option for drop out of the program. Simultaneously, the Petitioners created a "Special Authorization Program",[2] which program was substantially the same as the previous Illinois Emergency Program except that assistance could be provided more often. Permission was received from the Department of Health, Education and Welfare (H.E.W.) to receive federal funds for the program, from funding sources other than 606(e) and 603(a)(5). The Plaintiffs, while objecting to the new funding scheme, nevertheless refused to amend their complaint to challenge the changed funding scheme. After numerous hearings, the District Court, on July 12, 1976, granted Defendants' Motion to Dismiss the Cause for Mootness and for a Lack of Case or Controversy.

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[2] There are four specific emergent need situations for which Special Assistance may be authorized. The four emergent situations are as follows:

(1) *Homelessness:* The AFDC family is homeless (without shelter) as a result of damage to the building rendering it uninhabitable, as in a fire or flood.

(2) *Court Ordered Eviction:* The AFDC family is rendered homeless because of a court ordered eviction for reasons other than failure to pay rent. Moving costs *only* may be authorized.

(3) *Potentially Homeless:* The AFDC family is potentially homeless due to damage to a portion of the building or its contents.

(4) *Applicant in need at point of initial eligibility:* An AFDC client either determined eligible or presumed eligible for AFDC in dire need of clothing and/or household furnishings and equipment.

On appeal, *Mandley* v. *Trainor*, No. 76-1865 (*Mandley II*), the Appellate Court reversed the District Court and "*sua sponte*" directed that Plaintiff's proposed Final Judgment Order of November 26, 1975, be entered.

The Appellate Court stated:

> We hold that the Illinois defendants cannot avoid the eligibility requirements of Section 406(e)(1) by relabeling the plan as part of AFDC under Section 402 while still receiving 50 per cent federal funding for what is really Section 406(e)(1) emergency assistance to children.
>
> Stripped to the bone, our holding is founded on the premise that Section 403(a)(5) is the exclusive provision for federal funding of emergency needs under Part A of Subchapter IV. Slip Opinion p. 11. (Appendix no. 2)

REASONS FOR GRANTING THE WRIT

The effect of the ruling in *Mandley I*, in the eyes of the State defendant, was to prevent the State from operating a fiscally sound federally funded Emergency Assistance program pursuant to §606(e).[3] The State thus felt that it could not afford to create a federally funded program to meet emergent needs for destitute children both receiving and not receiving AFDC. However, the State defendant believed that it could still provide assistance to AFDC recipients in emergent need by the design of specific special needs programs which would be funded federally under provisions of the Social Security Act other than 45 U.S.C. §606(e) and §603(a)(5). The administrative and financial problems created by the *Mandley I* ruling could thus be avoided by avoiding §606(e) itself without reduction of federally funded assistance to AFDC recipients.

[3] The financial problem created by *Mandley I* is acute. Where all persons within a large class are deemed eligible and where the State is prohibited from covering selected emergent situations but must alleviate all destitution, the number of potential grants is enormous. The Court of Appeals stated that the State could nonetheless reasonably limit the amounts paid out, presumably by adjustment of benefit levels. But if the State were to retain the program, it would naturally have to cover those greatly increased number of newly eligible cases, thus either vastly increasing expenditures or radically cutting the size of the individual grant. At some point an emergency system with small grants becomes useless, as when you give $15.00 to a family with no place to live. Mandatory broad eligibility prices the program out of existence or out of reason. HEW has stated in its Application for a Stay that Wisconsin and Arkansas are no longer giving emergency assistance because of the financial problem.

The ruling in *Mandley II*, however, builds upon these administrative and financial problems created by *Mandley I* and compounds them in a way that directly effects the State and its AFDC recipients. The net result is a thwarting of the very purpose for which the AFDC program was designed, namely, to allow the use of a combination of state and federal monies to assist impoverished children and their families.

Mandley I articulated the view that 42 U.S.C. §606(e) is a monolith that must be accepted in toto or rejected. If the State choses to have a federally funded §606(e) Emergency Assistance program, the Court of Appeals stated that the program must cover all the persons identified therein, relieve all forms of destitution for all those persons, and must do so "forthwith". *Mandley II*, and the Order which the mandate of the Court of Appeals directed to be entered, show that "forthwith" is considered to be 24 hours from time of request to delivery of assistance. Even assuming the absence of other administrative problems and weekends, such a time frame obviously does not allow time for any adequate verification of need or eligibility. The Court of Appeals has thus effectively decided that the furnishing of assistance in any emergent situation must be subject to no administrative constraints.

Were *Mandley II* only to have gone this far, the effect upon the State would have been sufficiently onerous. The State, already by *Mandley I* being unable to control or predict the size of cost of a §606(e) program through selection of needs to be met, would now not even have time to verify the existence of the need. Such a system alone would have been administratively irrational.

Yet *Mandley II* went even further and required that any federally funded form of assistance which met emergent

need must be operated within the unadministerable framework set up by the Court's decision and Order for §606(e) programs. The State, under such a ruling, must insure that any special needs it currently grants or contemplates granting do not smack of satisfying emergent need lest the federal financial participation therein be deemed illegal. The effect of this ruling is thus to diminish the situation in which the federal government pays 50% of the AFDC program. Either the State will be forced to increase its percentage of payment or it will be forced to reduce the size and content of its program. Both of these results are contrary to the intent of the Social Security Act.

Mandley II thus makes clear that the Court of Appeals has erred in its entire view of the purpose of the legislation. These results which thwart the statutory purpose stem directly from the misconception that the State must either accept or reject §606(e) in toto. Were the state free, as Congress intended, rationally to select those emergent needs it wished to meet, funded either under §603(a)(1) and §603(a)(5) for recipients or exclusively under §603(a)(5) for nonrecipients, the statutory intent of the AFDC program would be served, not blocked.

This decision thus involves important questions of federal law which have not been settled by this Court and which should be settled by Review on Certiorari.

ARGUMENT

I.

THE COURT OF APPEALS ERRED IN FAILING TO AFFIRM THE DISTRICT COURT'S DISMISSAL FOR MOOTNESS SINCE THE STATE DEFENDANT HAS CEASED REQUESTING REIMBURSEMENT FOR AN EMERGENCY ASSISTANCE PROGRAM CREATED PURSUANT TO 45 U.S.C. §§603(a)(5) AND 606(e).

After the *Mandley I* ruling that the State defendant could not maintain its existing Emergency Assistance plan and continue receiving 606(e) funding, the State defendant applied to HEW for funding of a substantially similar special needs plan, to be funded under another provision of the statute. With the elimination of the 606(e) plan, the case was moot and recognized as such by the District Court. The Court of Appeals erroneously reversed such decision on the basis that any plan, no matter how titled or funded, which met emergent need was by definition a 606(e) plan. There is no statutory basis for such a conclusion. The provisions of 42 U.S.C. §603(a)(1) are by statutory design of extreme breadth, intended to allow each state to create specific programs to meet special needs. Plans which meet emergent needs pursuant to §603(a)(1) are designed to be more liberal than plans which meet emergent need pursuant to §606(e) since 606(e) assistance is limited to issuance during one month out of twelve, 45 C.F.R. §233.120(b)(3) while §603(a)(1) assistance allows more frequent issuances. The Opinion of the Court of Appeals in no way demonstrates a statu-

tory prohibition against creating special needs plans for meeting emergent needs pursuant to §603(a)(1).

The sole basis for the Court's ruling is that the actions of the state defendants would prevent the result that the Court of Appeals had sought in *Mandley I*. No relevant provisions from the Social Security Act, the regulations, or relevant cases are cited in opposition to the legal position of the defendants. To the contrary, the Secretary of H.E.W. in his analysis of this situation, directs the Court's attention to 45 C.F.R. §233.20(a)(2)(v) (application 619, p. 3). That regulation specifically permits a State agency to include special need items in its standard. That regulation permits the description of circumstances for which the State will provide benefits as long as those benefits are available to all recipients and applicants.

The result of the erroneous refusal to affirm the mootness decision by the Court of Appeals has grave implication for the Defendants and for all other state welfare systems and their recipients. The decision as written prohibits the federal funding of existing special needs programs created pursuant to §603(a)(1) if those programs meet emergent need. The federal defendant in its Application for a Stay of the Judgment has shown that a potential thus exists for a cutoff of federal funding from all special issuance programs. The result of such a cutoff would be either a significant burden upon state budgets or a diminution in welfare payments.

II.

THE COURT OF APPEALS ERRED IN DIRECTING THE ENTRY OF AN ORDER WHICH REQUIRED THE STATE DEFENDANT TO FILE A 606(e) PLAN WHICH WAS TO INCLUDE ALL DESTITUTE CHILDREN AND WHICH WAS TO ALLEVIATE ALL FORMS OF DESTITUTION.

A. THE SOCIAL SECURITY ACT DOES NOT PROHIBIT THE STATE FROM CREATING A §606(e) EMERGENCY ASSISTANCE PLAN WHICH PROVIDES ASSISTANCE FOR ONLY CERTAIN SPECIFIED EMERGENT NEEDS.

The order which, at the express direction of the Court of Appeals, has been entered by the District Court Judge, enjoins the State defendant:

> "From using any other means of limiting eligibility for emergency assistance more narrowly than the provisions of §406(e) . . . [42 U.S.C. 606(e)]"

The Order thus clearly precludes the State defendant from specifying certain federally fundable emergency needs and not meeting other federally fundable emergency needs in a 606(e) plan. Such preclusion is not consonant with the statutory design. The Order is based upon the reasoning that §606(e) constituted the establishment of eligibility criteria for the 606(e) emergency assistance system. All persons listed in these statutes as assistable, under this reasoning, must be assisted, and all assistance which can be given must be given. But §606(e) is not an eligibility provision. It is but a definitional section (its title is "Definitions") articulating what emergency assistance means. There is no question that forms of assistance which do not meet these definitions cannot be federally reimbursed under §603(a)(5). But there is neither authority nor logic to the Court of Appeals' conclusion this statutory framework which sets out the outer limits of federal fundability establishes mandatory eligibility criteria. To the contrary, a state may construct an emergency assistance program containing various elements, particular destitutions, which are within the definitional scope of §406 and having chosen those elements must effectively alleviate the destitution. *Purnell* v. *Edelman*, 365 F. Supp. 499 (N.D.Ill. 1973), aff'd in part 511 F.2d 1248 (C.A. 7 1974).

The entry of the Order which enjoins the state from creating a §606(e) emergency assistance program with less than the maximum permissible particular destitutions is in error.

B. THE ORDER IMPOSES ADMINISTRATIVE BURDENS ON THE STATE DEFENDANT WHICH PREVENT RATIONAL ADMINISTRATION.

Should the State defendant desire to take the financial risk of creating a §606(e) program of the scope ordered below, it still could not rationally embark upon the program because of the administrative quagmire the Order mandates. Among other mandated duties, the Department would have to furnish assistance within 24 hours of request. Adequate verification would thus be impossible. The Order takes no cognizance of the fact that speed is not always necessary even from the client's viewpoint. If a man tells a caseworker today that he will be evicted if he fails to make a rent payment next week, there is no rational basis for insisting that he have the money tomorrow. Such a wooden approach to administration demonstrates the unreasonableness and unworkability of the Order. It is certainly contrary to the statements of this Court in another Section 1983 action that principles

of federalism should keep the federal judiciary from limiting a governmental department's "latitude in the dispatch of its own internal affairs". *Rizzo* v. *Goode*, 423 U.S. 212, 96 S.Ct. 598, 608 (1976).

C. THE ORDER SUBJECTS THE STATE TO NEEDLESS CONTEMPT PROCEEDINGS.

The Order specifically directs the State defendants to file a detailed §606(e) Emergency Assistance plan. The State defendants ceased claiming federal funding for any assistance given under the program that was the subject matter of the lawsuit. The State defendants believed that unless and until they wished to claim federal funds for emergency assistance that they had no obligation to file an §606(e) plan, the Court of Appeals having ruled that there was no necessity for the Defendants to maintain any federally funded emergency assistance program.

The Plaintiffs, however, have sought in the District Court to have State defendants cited in contempt for their failure to file such a plan. Again, the inconsistency and the illogic of the Order is apparent. The State defendants require from this Court relief from the necessity of appearing in the District Court to answer the Request for a Rule to Show Cause.

CONCLUSION

The Decision and Order in the instant case require that a state forego all special programs for meeting emergent need for A.F.D.C. recipients unless assistance is provided pursuant to 42 U.S.C. 606(e) for all needy children and their families for all forms of destitution. The effect of such a decision will cause either substantially less federal funds to be available for the state welfare programs (if the states do not establish §606(e) programs) or greater state and federal expenditures for programs not susceptible to adequate verification. The case thus presents such important questions of federal law which have not yet been but which should be settled by this Court. Wherefore the Defendants pray that this Honorable Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

10:30

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge,

Honorable THOMAS R. McMILLEN

Cause No. 73 C2453

Date July 12, 1976

Title of Cause Mandley v. Trainor

Defendant's motion to dismiss for mootness is granted, and this cause is dismissed for lack of case or controversy.

Thomas R. McMillen

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-1865

VENUS MANDLEY, et al.,

Plaintiffs-appellants,

v.

JAMES L. TRAINOR, et al.,

Defendants-appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 73 C 2453—Thomas R. McMillen, *Judge.*

HEARD NOVEMBER 4, 1976—DECIDED NOVEMBER 23, 1976

Before CUMMINGS and TONE, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

CUMMINGS, *Circuit Judge.* This appeal is a sequel to the proceedings discussed in our earlier opinion reported in 523 F.2d 415 (1975) (*Mandley I*). There we held that

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

the Illinois Emergency Assistance Program for needy families with children defined eligibility more narrowly than Section 406(e)(1) of the Social Security Act (42 U.S.C. §606(e)(1) and therefore violated the Act. Our mandate was returned to the district court on October 24, 1975.[1] On November 26, the plaintiffs submitted a proposed final judgment and decree disposing of the controversy. A few days thereafter the state defendants filed a motion to dismiss the cause of action on the ground that on November 21, 1975, Illinois had withdrawn from participation in the Emergency Assistance Program established under Section 406(e). They did not inform the Court that they intended to carry on virtually the same program[2] under a different name but still with the usual 50 per cent federal funding as part of their regular Aid to Families with Dependent Children (AFDC) program. The record shows that this new plan was to avoid our September 25 decision and was conceived as early as November 17, 1975, and formally presented to HEW

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[1] In December 1975, the Department of Health, Education and Welfare requested and received an extension of time in which to petition the Supreme Court for certiorari. However, no petition for certiorari was ever filed. In January 1976, the Department sought to have us recall our mandate on the ground of mootness but we denied its petition on January 30, 1976.

[2] In a letter dated March 9, 1976, from Director Trainor of the Illinois Department of Public Aid to the Legislative Advisory Committee on Public Aid, Trainor revealed:

> "the special needs program we substituted affords the virtually same benefits and employs the delivery system we were using prior to the Court's ruling that our program was not in accord with S406(e) of the Social Security Act. Thus, there has been no effect upon the recipients * * *."

on April 23, 1976, but effective January 1, 1976. However, on November 18, the state defendants misled the Court by asserting that only state funding would be employed.

HISTORY OF EMERGENCY ASSISTANCE AFTER *Mandley I*

In order to understand how the state defendants have vacillated between affected compliance with *Mandley I* and a final blatant disregard of the congressional eligibility requirements enforced thereby, it is necessary to trace the history of emergency assistance in Illinois after that decision became final.

At the November 17, 1975, meeting of the Illinois Legislative Advisory Committee on Public Aid, defendant Trainor submitted the recommendation dated October 30, 1975, of his Department to "Eliminate [42 U.S.C.] 606(e) Program and Create a Program for Meeting Emergent Burnout Cases to be Funded Under Section 602 and Section 603." After consideration of the Department's proposal, the Committee endorsed the Department's recommendations and requested that the Department report back to the Committee "at its April 1976 meeting with the results of this program and [its] recommendations to handle other special emergency needs which may not have been met."

In its October 30 position paper, the Department indicated that "[e]liminat[ion] [of] the 606(e) Emergency Assistance Program" was out of the question:

> "The Department, although believing this [eliminating] alternative to be legally acceptable, finds this alternative totally unacceptable. The Department believes that certain Emergency conditions, such as homelessness through burn outs are needs which the Department of Public Aid clearly ought to meet and the Department would not wish to curtail its ability to do so."

"[O]fficial notification to the Department of Health, Education and Welfare that Illinois shall not request reimbursement pursuant to § 406(e) of the Social Security Act (42 U.S.C. § 606(e)) for any expenses incurred after November 21, 1975, as the Department is terminating its program for 'Emergency Assistance to Needy Families with Children' existing pursuant to said § 406(e)" was given by the Department of Public Aid in a November 21, 1975, letter to HEW.

On April 23, 1976, the state defendants submitted a plan to HEW (Joint Appendix 21-132—21-140) that was consistent with this notification of November 21. The April 23 plan, discussed *infra,* is the one now in effect.

On April 26, 1976, before another meeting of the Legislative Advisory Committee on Public Aid, Trainor indicated that the Department would assent to a broader emergency assistance program to alleviate destitution:

> "After July 1, 1976, the program would be an a six-month trial basis. It would broaden the emergency needs to include persons to whom destitution exists or to whom destitution is threatened, and remedy any cause of destitution" (Tr. at 40).

On May 3, 1976, in a report to the Court, defendants averred that the:

> "Department will in all probability choose to apply for funding pursuant to § 406(e) of the Social Security Act (42 U.S.C. § 606(e) *et seq.*), when it has completed designing such an emergency assistance program and will submit the necessary State plan amendments to the Department of Health, Education and Welfare."

In the same report, defendants stated they were not "presently claiming any funds under § 606(e)."

In a May 12 report to the Court, defendants submitted a proposed plan which laid out eligibility requirements at least colorably consistent with Section 406(e)(1). At a May 17, 1976, meeting of the Legislative Advisory Committee, Representative Mann indicated that the implementation date of the broadened plan would be advanced from July 1, 1976, to April 1, 1976.

On May 19, 1976, HEW filed its comments on the May 12 plan. Acknowledging that the new plan "differs radically from the old emergency assistance program," HEW noted:

> "It is the Secretary's understanding that the plan description is merely a report to the Court concerning the present state of the Director's thinking concerning a new Illinois emergency assistance program. *When and if, that thinking crystalizes and is embodied in a completed plan, that plan will be submitted to the Secretary for approval. Until that time, the Secretary can have no formal views on the acceptability of any plan that the Director may be considering.*" (Emphasis supplied.)

Because of the broadened eligibility requirements, the plaintiffs believed that the "objections to the earlier plan [they] intended to file on May 19, 1976 [might] be unnecessary either in whole or in part," although the plaintiffs reserved the right to file objections to the amended plan.

On June 14, the Legislative Advisory Committee approved a plan with the following eligibility requirements:

> "Recipients of AFDC, AABD, GA (in units administered by the Department) and persons who could be found presumptively eligible for such programs, including any needy child under 21 and the specified relatives with whom he is living. An additional condition of eligibility is that the persons must be destitute or immediately threatened with destitution."

This plan, by its own terms, sought reimbursement, at least in part, pursuant to Section 406(e).

On June 16, 1976, the plaintiffs were served with a June 15 notice of filing in the district court of the same liberalized Emergency Assistance Program, "which in part will employ § 406(e) emergency assistance funds," that the Legislative Advisory Committee had approved on June 14. Curiously, on June 17, 1976, counsel for the State informed the plaintiffs that he had been ordered not to file the new plan. The next day, the State filed a report of status which averred that the State would not "formulate or implement any Emergency Assistance Program which in part or in whole employs federal funds pursuant to Section 406(e) of the Social Security Act." Perhaps counsel for the State was inadvertently confirming the classic Shakespearean lesson on semantics: "What's in a name? That which we call a rose by any other name would smell as sweet." (*Romeo and Juliet*, Act I, Scene v.) At any rate, that June 14 plan was never filed in court.

The plan submitted to HEW on April 23, 1976 (Joint Appendix 21-132—21-140) was virtually the same plan as that declared illegal in *Mandley I*. Even in its brief here, Illinois lists only two minor changes in the plan submitted to HEW, neither of which has any relevancy to broadened eligibility requirements.[3] The liberal plan worked out between the April 26 and June 14 Legislative Advisory Committee hearings which HEW felt "radically

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[3] See Note 6 *infra*.

different" from the pre-*Mandley I* plan has never been submitted to HEW as far as can be determined from the opaque record before us.

Rather the plan submitted to the regional office of HEW on April 23, 1976, was a program with eligibility requirements which were identical in all material particulars to the pre-*Mandley I* program. Thus on July 12, 1976, when the district judge declared the case moot, the only change with respect to the Illinois Emergency Assistance Program funded by HEW was that the source of funding had been switched from Section 403(a)(5) to Section 403(a)(1). Most importantly for our purposes, the scope of the program's eligibility requirements was identical to that of the eligibility requirements declared illegal in the pre-*Mandley I* plan.

The end result is succinctly detailed in a June 1, 1976, colloquy between the district judge and plaintiffs' counsel:

> "The Court: But I don't think, as I get it, nobody is being deprived emergency assistance, although they may not get it under Section 606(a) [sic, 606(e)].
>
> "Mr. Lefkow: That is not correct, your Honor. Many, many people are being deprived of emergency assistance." (Tr. at 8)

Dismissal of Action

On December 9, 1975, the defendant Secretary of Health, Education and Welfare filed a motion to dismiss on the ground of mootness. The state and federal motions to dismiss were answered by plaintiffs and denied by Judge McMillen on December 31, 1975, and he ordered the defendants to file objections to the plaintiffs' proposed final judgment and decree within three weeks. Such objections

were filed by the state defendants on January 21, 1976, and by HEW on the following day but never ruled upon.[4] Instead, after plaintiffs declined to amend their complaint further, the district judge dismissed the cause for mootness and for lack of case or controversy on July 12, 1976. This appeal followed. We reverse.

Structure of Subchapter IV of the Social Security Act as it Relates to Funding of Aid Programs.

In order to appreciate the funding of "emergency assistance" programs, it is necessary to outline briefly the structure of Subchapter IV funding. Section 401 authorizes the Congress to appropriate for each fiscal year a sum sufficient to carry out the general purposes of Part A of Subchapter IV—Aid to Families with Dependent Children. The sums so appropriated are made available to states which have submitted AFDC plans. Only states whose plans have been approved by the Secretary of Health, Education and Welfare may receive federal funds. The criteria for approval and the mechanics of approval are set forth in Section 402.

Once a state AFDC plan has been approved, Section 403(a) directs the Secretary of the Treasury to pay funds to the state from the funds appropriated under the authority of Section 401. Subsections (1)-(5) of Section 403(a) describe the various formulae used to calculate the actual dollar amounts to be paid. Since Section 403(a) actually directs the payment of funds, it is the section of

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[4] In order to force a district court decision so that they would then have a final order for purposes of appeal to this Court, plaintiffs asked us in March 1976 to mandamus the district court to decide whether or not to enter the plaintiffs' final judgment. We denied plaintiffs' petition for mandamus on March 31, 1976.

Part A which should be referred to as the "funding" provision of Part A. Section 403(a)(5) provides that the Secretary of the Treasury shall pay 50 per cent of a state's expenditures for "emergency assistance" to needy families with children. It is the only part of Section 403(a) dealing with "emergency assistance."

THE DEFENDANTS' FRAMING OF THE MOOTNESS ISSUE

At the time of *Mandley I,* the state defendants were receiving emergency assistance funds under Section 403(a)(5). These funds were expended under the State's plan as "emergency assistance to needy families with children" as defined by Section 406(e)(1).

We are now advised that Illinois has ceased receiving funds pursuant to Section 403(a)(5) with the attached "strings" of Section 406(e)(1). Instead the State is receiving federal funds for emergency assistance under its regular AFDC plan pursuant to Section 403(a)(1). Since Section 403(a)(1) does not on its face include the term "emergency assistance to needy families with children," the State argues that the funds expended under Section 403(a)(1) no longer come with the attached "strings" of Section 406(e)(1). Defendants argue that the mandatory application of Section 406(e)(1) eligibility standards to the states announced in *Mandley I* occurs only if federal funding is received pursuant to Section 403(a)(5). Their argument concludes that since funding is now received only under Section 403(a)(1), the case is moot. Plaintiffs counter by alleging a circumvention of *Mandley I* by this change in funding.

SCOPE OF THE PRESENT CONTROVERSY

As a threshold matter, we must consider whether the plaintiffs' pleadings are broad enough to permit us to decide whether the defendants' change of funding is an

artifice to avoid the *Mandley I* mandate. The amended complaint is an action brought to secure rights established by Section 406(e)(1) of the Social Security Act. Those are the rights that plaintiffs will seek to vindicate. The developments that took place after *Mandley I* were covered by the federal and state defendants' motions to dismiss, the plaintiffs' answer thereto, and the supporting documents filed by the respective parties. The very issue now before us was thus submitted and before the district court without the need of further amendments to the complaint.

This case is not moot, for the state defendants are still operating an emergency assistance program with matching federal funds, although under the guise of a "special assistance" program.[5] There is a live case or controversy because plaintiffs maintain that the state defendants must still comply with the standards of Section 406(e)(1) as long as federal funding is used for this program, while the state and federal defendants remain juxtaposed against plaintiffs.

WHETHER SECTION 406(e)(1) "STRINGS" ATTACH TO EMERGENCY ASSISTANCE REGARDLESS OF FUNDING.

The effect of Section 1318. Before reaching the ultimate issue—whether Section 406(e)(1) "strings" attach to

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[5] Since we answer the issue of mootness at this fundamental level, we need not pass on the plaintiffs' answer to the defendants' motions to dismiss on grounds of mootness wherein they allege that "defendants intend by a technical maneuver to suspend temporarily requesting funds under § 406(e), to persuade this [district] court to dismiss the case as moot based on that suspension, and once the case is dismissed to return to § 406(e) funding without any prohibitions, injunctive or otherwise, from this [district] court." (Plaintiff's Memorandum in Opposition to Motions to Dismiss, December 17, 1975, at 5).

emergency assistance regardless of funding—we must verify whether the present funding actually occurs under Section 403(a)(1). This is because HEW has recently informed us that the federal funding is solely under 42 U.S.C. § 1318. Section 1318 provides in pertinent part:

> "In the case of any State which has in effect a plan approved under subchapter XIX of this chapter for any calendar quarter, the total of the payments to which such State is entitled for such quarter, and for each succeeding quarter in the same fiscal year (which for purposes of this section means the 4 calendar quarters ending with June 30), under paragraphs (1) and (2) of section * * * 603(a), * * * of this title shall, at the option of the State, be determined by application of the Federal medical assistance percentage (as defined in section 1396d of this title), instead of the percentages provided under * * * such section, to the expenditures under its State plans approved under * * * part A of subchapter IV of this chapter, which would be included in determining the amounts of the Federal payments to which such State is entitled under such section, but without regard to any maximum on the dollar amounts per recipient which may be counted under such section."

This provision as it relates to Section 603(a) (Section 403(a) of the Social Security Act) was added in 1968 by the Social Security Amendments of 1967. 1 U.S. Code Cong. & Admin. News 1042 (1967). The 1965 provision it amended was itself put in the Social Security Act merely to:

> "permit any State which has in effect a plan approved under the new title XIX [Medicaid] to claim Federal participation in its expenditures under all

> of its Federal-State public assistance programs by application of the new formula contained in title XIX instead of using the varying formulas in the existing titles." 1 U.S. Code Cong. & Admin. News 2265 (1965).

Indeed Section 1318, by its own terms, acknowledges that the entitlement for funding payments is still provided under Section 603(a) (Section 403(a) of the Social Security Act). Thus the interaction between Section 603(a) and 1318 preserves the former's status as the funding provision with the effect of the latter here to maintain the same 50 per cent federal and 50 per cent state ratio of funding that exists for emergency assistance to needy children under Section 403(a)(5) of the Act. At any rate, even if the funding were now solely under Section 1318, HEW states that "does not materially change the argument of the appellee [HEW]" (Nov. 1, 1976, HEW motion to correct its brief). The state defendants have not mentioned Section 1318 orally or on brief, evidently also realizing it does not change their position. As with emergency assistance funding under Section 403(a)(5), Illinois receives a 50 per cent federal share for its AFDC program under Section 1318 alone or in combination with Section 403(a)(1).

The Ultimate Issue. The state defendants admit that they are conducting the same program under the label "special assistance" that they formerly conducted under the label of emergency assistance, with minor exceptions.[8]

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[8]At HEW's suggestion, effective October 12, 1976, the state defendants removed the restriction limiting special assistance payments to once in any 12 consecutive months. Simultaneously, they no longer authorized the payment of moving costs as a result of court-ordered eviction. AFDC Manual, Release No. 76.46 (October 12, 1976), amending Manual Chapter 600.

Illinois contends that the service it formerly gave under Section 406(e)(1) as emergency assistance to needy families with children is now given under Section 402 as part of aid to needy families with children. Instead of seeking federal funding for the program under Section 403(a)(5) authorizing the Secretary of Treasury to pay 50 per cent of the total amount expended by a state under its plan for emergency assistance to needy families with children, the state defendants assert that they now obtain federal funding under Section 403(a)(1) providing that the Secretary of the Treasury pay each state which has an approved AFDC plan certain amounts as computed thereunder. We hold that the Illinois defendants cannot avoid the eligibility requirements of Section 406(e)(1) by relabeling the plan as part of AFDC under Section 402 while still receiving 50 per cent federal funding for what is really Section 406(e)(1) emergency assistance to children.

Stripped to the bone, our holding is founded on the premise that Section 403(a)(5) is the exclusive provision for federal funding of emergency needs under Part A of Subchapter IV. Section 406(e)(1), edited for present purposes, provides:

> "The term 'emergency assistance to needy families with children' means any of the following [furnished during a defined time period to people meeting defined eligibility standards]—
>
> "(A) money payments, payments in kind, or such other payment as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

> "(B) such services as may be specified by the Secretary;
>
> *but only with respect to a State whose State plan approved under Section 602 [Section 402 of Social Security Act] of this title includes provision for such [emergency] assistance.*" (Emphasis supplied.)

Clearly the State has the option of whether or not to include a provision in its state plan in order to receive federal funding under Section 403(a)(5) for Section 406(e)(1) emergency assistance. The legislative history of Section 406(e) reinforces this reading of the statute. As the Senate Finance Committee's report stated:

> "a new program optional with the States would authorize dollar-for-dollar Federal matching to provide temporary assistance to meet the great variety of situations faced by needy children in families with emergencies." 2 U.S. Code Cong. & Admin. News 2838 (1967).

But the fact that a State has the option of whether or not to claim federal funding under Section 403(a)(5) for Section 406(e)(1) emergency assistance is totally distinct from the question of whether a state has the option to choose whether to receive federal funding for emergency needs under Section 403(a)(5) or 403(a)(1). We conclude the state does not enjoy such an option.

HEW's principal argument is that Section 403(a)(5) merely provides an additional source of monies for state emergency assistance plans. The total amount of funds appropriated in a given year for AFDC by the Congress is allocated according to the applicable formula in Section 403(a)(1). In any given year, the Section 403(a)(1)

formula would determine a fixed dollar amount. Thus to the extent that federal funding for a "special assistance" program is sought from the total amount of monies in a year allocated to fund Section 403(a)(1) AFDC programs, these other programs presumably would be reciprocally limited. Since Section 403(a)(5) draws on a different block of the funds appropriated for emergency assistance in any given year, a similar limiting tension would not exist on state emergency programs funded under Section 403(a)(5). In this sense, Section 403(a)(5) funding is "additional." But by underscoring these funding subtleties, HEW has shown why Section 403(a)(5) should be construed as the exclusive funding provision for emergency assistance. The 1967 amendments were introduced to correct the unsatisfactory delivery of state emergency assistance. Those amendments would be undermined if HEW's construction were permitted to create this limiting tension on Section 403(a)(1) AFDC funds while the Section 403(a)(5) block of funds appropriated by Congress for emergency assistance in a given fiscal year lies unused.

When Congress added the emergency aid for children provisions to the Social Security Act in 1967, Senator Curtis explained them on the floor of the Senate (113 Cong. Rec. 36319 (1967)):

> "Now, Mr. President, I should like to refer to another new provision in this measure. *For the first time, the Federal Government will match money for emergency assistance. This has not been in the law before.* For a period of 30 days, emergency assistance can be paid in cases where they cannot meet other qualifications. Many of the States have asked for this provision, and it is one that should be looked at by those who say they will reject this bill because it is not liberal. It would do many of the things for which States, welfare directors, and others have been asking for a long time." (Emphasis supplied.)

Speaking directly after the acceptance of the Conference Report by the Senate, Senator Mansfield indicated the 1967 amendments' scope as follows (113 Cong. Rec. 36925 (1967)):

> "Families with emergency trouble will be able to receive emergency assistance in whatever form it is best for them at their time of need. Families which have been burned out, suffered personal tragedies and such will be able to get money, medical care, shelter provided, food sent in, or whatever else is needed to deal with the crisis. The committees are to be commended for adding this provision, thus recognizing that emergencies which strike families cannot be dealt with by business-as-usual methods.
>
> "Sometimes emergencies which strike families reveal deep-seated problems which establish that the children are in danger of exploitation or abuse. Under the legislation, States are required to have, in advance, plans to deal with these situations. This means working closely with the courts and being prepared, when necessary, to find places for children removed from the home by the courts. For these children, previous provisions have been inadequate. Under the new legislation, the financing will be sufficient to assure that the child may be placed in a safe place with the Federal Government paying its share of the cost."

The tenor of these remarks shows the importance of the program and that participating states would have to provide a plan approved by HEW. Emergency assistance was

meant to supplement normal AFDC payments. As the Senate Finance Committee reported:

> "The Committee understands that the process of determining AFDC eligibility and authorizing payments frequently precludes the meeting of emergency needs when a crisis occurs. In the event of eviction, or when utilities are cut-off, or when an alcoholic parent leaves children without food, immediate action is necessary. It frequently is unavailable under State programs today." (2 U.S. Code Cong. & Admin. News 3002 (1967)).

The federal regulations require that "emergency assistance will be given forthwith" (45 C.F.R. Section 233.120(a)(5)), but Congress provided in Section 406(e)(1) that emergency assistance should be furnished only once in any 12-month period. It is thus apparent that regular AFDC public assistance was administratively and congressionally distinguished from emergency assistance, which is a one-time grant to "avoid destitution" (Section 406(e)(1)). As we held in *Mandley I*, relying in part on additional legislative history, Congress intended the eligibility provisions of Section 406(e)(1) to be mandatory on states giving emergency assistance. 523 F. 2d at 420-423. To like effect, see *Williams* v. *Wohlgemuth*, 540 F.2d 163 (3d Cir. 1976); Note, Meeting Short-Term Needs of Poor Families: Emergency Assistance for Needy Families with Children, 60 Corn. L. Rev. 879, 886-891 (1975) (hereinafter cited as Cornell Note). In our view, the synergistic sum of all these factors results in the conclusion that Congress intended Section 403(a)(5) to be the exclusive source of federal funding in Part A of Subchapter IV of the Social Security Act for the Section 406(e) emergency assistance needs of the citizens of the states.

Illinois cannot evade the Section 406(e)(1) eligibility requirements by relabeling its emergency assistance program as AFDC "special assistance" while still obtaining matching funds from the federal government. See *Youakim* v. *Miller*, 425 U.S. 231.[7] If that were permissible by a mere change in nomenclature, the requirements of Section 406(e)(1) would be totally eviscerated.[8] Therefore, if Illinois continues to accept federal funds for its "special assistance" program, the guidelines established by Congress in Section 406(e)(1) must be met (*Williams* v. *Wohlgemuth*, *supra*, at 170 n. 37; *Lynch* v. *Philbrook*, ... F.Supp. ....., ... (D. Vt. 1976)), and HEW must continue to provide half the funding under Section 403(a)(5), as it formerly did with respect to Illinois.

We may take note that state funds available for expenditure on welfare programs are tightly limited. The Senate Finance Committee's report shows that through emergency assistance Congress meant "[t]o encourage public welfare agencies to move promptly and with maximum effectiveness in [emergency situations]." 2

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[7] In discussing *Youakim*, HEW has recognized that for a foster care plan to be funded under Section 403(a)(1) or 1318, it must meet the inclusion requirements in Section 408 (Br. 11). Similarly here, even if an emergency assistance plan (by whatever name) is funded under Section 403(a)(1) or 1318, it must meet the eligibility requirements of Section 460(e)(1). In the words of another metaphor of the same genus, whatever Illinois presently dubs its emergency assistance plan, "a rose is a rose is a rose."

[8] The *amici curiae*, various private charities, state in their brief that if this were

> "successful, [Illinois] would make permanent the transfer of the burden of providing for most emergencies to the private social welfare organizations in violation of the basic principles of both federal and state welfare policy."

U.S. Code Cong. & Admin. News 3003 (1967). Congressman Mills noted in the debates that with emergency assistance, the House believed "that encouraging the States to move quickly in family crises, supplying the family promptly with appropriate services, would in many cases preclude the necessity for the family having to go on [AFDC] assistance on a more or less permanent basis." 113 Cong. Rec. 23054 (1967). Funding with Section 406(e)(1) eligibility requirements for emergency assistance requires the states to meet the needs of a broader class of individuals. Cornell Note, *supra,* at 883, 884. The total state share, assuming maintenance of the present level of benefits,[9] for funding emergency needs when the federal matching share comes under Section 403(a)(5) would normally be larger than if the federal funding comes under AFDC Section 403(a)(1) (whether singly or in conjunction with Section 1318), a provision ostensibly free of the Section 406(e)(1) eligibility requirements. Congress would be thwarted in its aim to encourage the provision of emergency relief to those children whom it intended as targets if a state had the choice of claiming emergency assistance funds under Section 403(a)(1) for AFDC without the "strings" of Section 406(e)(1).

RELIEF

This case concerns emergency needs of people in dire straits. Yet over three years have passed since the filing

[9] Of course, the level of state benefits does not have to remain constant. As we said in *Mandley I*:

> "Because Illinois has accepted federal funds to operate an emergency assistance program, it is bound by the eligibility provisions of 42 U.S.C. § 606(e). This need not result in additional expense to the state but with existing appropriations should at least result in helping a broader number of persons, although more moderately than at present." 523 F.2d at 423.

of the complaint and over one year has gone by since the return of our mandate in *Mandley I*. Therefore, we now consider *sua sponte* the objections of the defendants to the merits of plaintiffs' proposed final judgment of November 26, 1975. Cf. *Hartford-Empire Co.* v. *United States,* 323 U.S. 386, 410-435.

The state defendants object principally on the grounds that Section "406(e) funding" is no longer utilized by Illinois. For the reasons stated above, we cannot sustain this line of objection.[10] Lest Illinois mistakenly understand this opinion to strip it of control over the implementation of its emergency assistance program, we hereby affirm our observations in *Mandley I:*

[10] The State defendants also apparently maintain that *Purnell* v. *Edelman,* 511 F.2d 1248 (7th Cir. 1974), is a form of *stare decisis* upon our decision here. In the words of defendants' objection:

> "That case presented a problem to the Trial Court on remand identical to the instant situation. In *Purnell,* the Illinois Department of Public Aid chose to cease its participation in the same 406(e) Emergency Assistance program of utility service 'turnons' and instead adopted a different mode of handling the problem which did not use §406(e) funds. Plaintiffs, on remand to the Court below, sought a Rule to Show Cause why the Defendants should not be held in contempt of Court. Upon being satisfied that the state was no longer claiming funds under the 406(e) Emergency Assistance program, *plaintiffs withdrew their motion for a rule.* In that case withdrawal from the 406(e) program was sufficient to moot the controversy." (Emphasis supplied.)

The answer to this objection is immediate. In *Purnell,* the plaintiffs withdrew their own motion on the propriety of the State's funding of emergency assistance with federal funds not subject to Section 406(e) eligibility standards, thereby voluntarily mooting the case. But in *Mandley II* the plaintiffs, far from voluntarily mooting their own case, are vigorously pursuing an attack on the validity of the state's emergency assistance program.

"Illinois, should it elect to continue to provide an emergency assistance program in the future, will still have substantial control of its program. It will be able to choose the level of benefits that it will provide and to set the standard of need. It may reasonably limit the amounts paid out in emergency assistance, *Dandridge* v. *Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491, but it will not be able to declare ineligible those who come within the federal definition of eligibility in Section 606(e). This Court need not establish the exact meaning of the eligibility provisions of Section 606(e) because this case requires only that the validity of the specific Illinois program be determined. The problem of setting workable definitions for the somewhat amorphous eligibility criteria in Section 606(e) may be addressed by HEW rule-making. Such rule-making should aid the states in preparing programs that are in accord with the eligibility criteria set by Congress." 523 F.2d at 422-423.

Part of the proposed final judgment orders HEW to file a proposed regulation with the district court to conform to our opinion. HEW contends that a federal district court has "no authority to order the performance of a discretionary act, such as the adoption of any particular regulation." But the duty of the Secretary to promulgate regulations implementing the provisions of the Social Security Act is a mandatory one. 42 U.S.C. § 1302. Implicit in HEW's objection is the notion that ordering the promulgation of regulations is an untoward invasion of the province of the Secretary. This contention has been persuasively answered by the Second Circuit. In *Kingsbrook Jewish Medical Center* v. *Richardson,* 486 F.2d 663 (2d Cir. 1973),[11] the court reversed

> "the order below and remand[ed] to the district court with instructions to grant Kingsbrook's motion for summary judgment, to the extent of directing the Secretary of Health, Education and Welfare to promulgate regulations consistent with the interpretation [42 U.S.C.] 1395x(v)(1) that we have announced." 486 F.2d at 670.

In an explanatory footnote, the court observed that:

> "Where there are no material issues of fact in dispute, an appellate court reviewing the dismissal of a complaint can, upon reversal, also remand with directions to grant summary judgment on appellant's previously denied cross-motion. Under the circumstances present here 'we perceive no reason for not bringing this litigation to an end.' Stein v. Oshinsky, 348 F.2d 999, 1002 (2d Cir. 1965); 6 J. Moore, Federal Practice ¶ 56.13 at 2251-52 (2d ed. 1972)."

Since the defendants did not object to the findings of fact in the plaintiffs' final judgment, we can perceive no reason not to bring the instant case "to an end."

Paragraph B-1 of the proposed final judgment purports to order the Secretary to include some specific items in the regulation, *viz.* "definitions of such terms as 'necessary to avoid destitution' and 'lack of available resources' which are comptatible with providing emergency assistance when a needy child is approaching destitution." While it would be salutary to include such definitions in the new

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[11] Professor Davis has approvingly characterized this case as an instance of a court being "guided by [its] usual common sense." K. Davis, Administrative Law of the Seventies, § 23.09 at 545 (1976).

regulation and while the Secretary might find it necessary as a matter of administrative practicality to include them, we will not order HEW specifically to include any items in its new regulation.[12] Of course, whatever regulations the Secretary issues must be consistent with today's opinion and *Mandley I*.

We have considered the defendants' other objections to the proposed judgment and find them without merit. Because there has been no compliance with our previous mandate for more than a year, we direct the district court to enter plaintiffs' proposed judgment forthwith except with respect to the definitional aspect of Paragraph B-1. In addition, finding of fact 7 should be deleted as obsolete, and Paragraph A-1(c) must be modified in accord with note 12. A fresh mandate will issue and be returned to the district court this day.

Judgment reversed and remanded for further proceedings consistent herewith.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

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[12] Because of this change, Paragraph A-1(c) of the final judgment is modified to commence "Until HEW files regulations under Paragraph B-1 below,".

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VENUS MANDLEY, et al.,

Plaintiffs,

v.

JAMES L. TRAINOR, etc., et al.,

Defendants.

No. 73 C 2453

FINAL JUDGMENT AND DECREE

This matter comes on for entry of a final judgment and decree pursuant to prior decisions of this court and pursuant to the mandate of the Court of Appeals reversing in part and affirming in part the orders of this court to and including this court's order of March 14, 1975. The court being fully advised finds and concludes as follows:

FINDINGS OF FACTS

1. Except as modified herein, the factual findings of this court's memorandum decisions of November 21, 1974, February 5, March 14, August 1, and October 24, 1975 are incorporated herein as part of this final judgment.

2. The class of plaintiffs is composed of all (1) Aid to Families with Dependent Children (AFDC) recipients,

(2) applicants for AFDC and (3) other families with needy children, in Illinois who are eligible for emergency assistance within the eligibility standard of §406(e) of the Social Security Act (the Act), 42 U.S.C. §606(e), as set out in paragraph 9 (p. 5) below.

3. Plaintiff Frances Gallman and her family met the eligibility standard of §406(e) at the time of their application in November, 1973, to defendant Illinois Department of Public Aid (IDPA) for emergency assistance.

4. Defendants IDPA and its directors Edelman and Trainor have denied and continue to deny emergency assistance to plaintiff Gallman and to members of the plaintiff class who meet the eligibility standard of §406(e) but whose emergency need arises from circumstances other than those described in defendants' regulations, IDPA Categorical Assistance Manual Ch. 6500, since renumbered as Ch. PO 610.5.

5. The state defendants have reported to this court the length of time taken to process requests for emergency assistance, these reports having been made pursuant to the court's order of March 14, 1975. There the court required defendants to speed up the processing of emergency assistance requests from the "not uncommon" 7-10 days found by the court in its order of November 21, 1973, so that emergency assistance requests will normally be disposed of within 24 hours. These reports show and I find as follows:

a. For requests for emergency assistance granted during the two reporting periods, May 8 - June 9, 1975 and August 1 - 27, 1975, the periods of time taken for processing requests up to the time a check was ready to be placed in the mail or for pick up was

more than one day in 88.8% (103 of 116) of cases in Cook County and in 71.6% (68 of 95) of cases in downstate counties:

	Cook	%	Downstate	%
Same day or 1 day	13	11	27	28.4
2 - 3 days	22	18.6	26	27.4
4 - 6 days	40	33.9	21	22.1
7 - 10 days	16	13.6	13	13.7
11 - 15 days	17	14.4	7	7.4
16 - 25 days	7	5.9	1	1.1
26 or more days	1	.8	0	0
not ascertained	2	1.7	0	0
	118	99.9	95	100.1

b. For requests for emergency assistance granted during the two reporting periods (May 8 - June 9 and Aug. 1 - 27, 1975) four methods of delivery of emergency assistance checks were used: mail, pick up by client at fiscal management office, disbursing order at local office and by "C.D." (unexplained), as follows:

	Cook	Downstate
Mail	60	74
Disbursing Order	16	0
Pick-up at Fisc. Mgmt.	42	9
C.D.	0	12
	118	95

c. The amount of time from the date a cneck was ready for delivery by mail until receipt by the client during the two reporting periods was as follows:

	Cook	Downstate
1 day	31	34
2 days	8	6
3 days	0	1
4-6 days	0	1
7 or more days	1	3
Not ascertained	20	29
	60	74

Therefore, of those known, checks were delivered one or two days after mailing in 97.5 percent of cases in Cook and 88.9 percent downstate.

d. The reports demonstrate and the court finds that great and excessive delays continue to exist in the processing of emergency assistance checks, so that only a small percentage of checks are processed within 24 hours and delivered to the client within one or two days thereafter.

6. Since the mandate of the Court of Appeals was returned to this court, the state defendants have reported that they plan imminently to withdraw from the emergency assistance program authorized by section 406(e) of the Act and have further reported that they plan to provide the same limited emergency assistance avaliable under their program which was challenged and found unlawful in this lawsuit. In so doing, defendants intend to claim federal funds for this emergency assistance program under §§ 402 and 403(a)(1) (regular AFDC funds) of the Act.

CONCLUSIONS OF LAW

8. As defined in paragraph 2 above, this is a proper class action under Rule 23 of the Federal Rules of Civil Procedure.

9. The state defendants have violated and continue to violate § 406(e) of the Act in denying emergency assistance to plaintiff Frances Gallman and members of the class who are eligible for emergency assistance as defined in § 406(e), to wit: families with a needy child (i) under the age of 21, (ii) who is living with any of the relatives specified in § 406(a)(1) of the Act in a place of residence maintained by such relative as a home, (iii) where such child is without available resources, (iv) where emergency assistance is necessary to avoid destitution of or to provide living arrangements in a home for such child, and (v) where such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment.

10. Because defendants' emergency assistance program Categorical Assistance Manual Ch. 6500 (PO 610.5), limits eligibility more narrowly than § 406(e) permits, its enforcement and operation are unlawful.

11. Congress, in §§ 406(e) and 403(a)(5) of the Act has determined the terms of eligibility and funding for an emergency assistance program. The state defendants' effort to avoid the eligibility standards of § 406(e) by claiming funding for emergency assistance from funds available for AFDC or for any other federally funded program is contrary to the clear intent of the Act and a violation of § 406(e)(1).

12. Defendant United States Department of Health, Education and Welfare has violated §§ 406(e) and 402(b) of the Act, 42 U.S.C. §§ 606(e) and 602(b), and its own

regulations, 45 C.F.R. § 233.10(a)(1)(ii)(A), in approving and funding Illinois' emergency assistance plan which denies such assistance to members of the plaintiff class made eligible by § 406(e).

13. Defendant H.E.W., furthermore, may not approve or fund a state's emergency assistance program, whether designated as a "special need" or otherwise, except as authorized by § 406(e).

14. The state defendants have violated and continue to violate § 406(e) of the Act and regulations promulgated thereunder, 45 C.F.R. § 233.120(a)(5), which require that emergency assistance be given forthwith, by causing, and failing to correct after this court's order of November 21, 1974, serious delays in providing emergency assistance to members of the plaintiff class.

It Is Therefore Ordered And Decreed, as follows:

A. Defendants the Illinois Department of Public Aid, Joel Edelman and James I. Trainor, their successors in office, agents, employees and assigns are enjoined, so long as Illinois receives federal funding under Title IV-A of the Social Security Act, from claiming reimbursement for emergency assistance (however designated) under any other section of the Act than §§ 406(e) and 403(a)(5) and are enjoined from using any other means of limiting eligibility for emergency assistance more narrowly than the provisions of § 406(e), and are further enjoined from denying emergency assistance to plaintiff Frances Gallman and to any member of the plaintiff class with a needy child

(i) who is under the age of 21,

(ii) who is living with any of the relatives specified in § 406(a)(1) of the Act in a place of residence maintained by such relative as a home,

(iii) where such child is without available resources,

(iv) where emergency assistance is necessary to avoid destitution of or to provide living arrangements in a home for such child, and

(v) such destitution did not arise because such child or relative refused without good cause to accept employment or training for employment.

In furtherance of this injunction these defendants are specifically directed to do the following:

1. Within 7 days from entry of this order, defendants shall file with the court and with defendant HEW amendments to its AFDC Categorical Assistance Manual (and to forms and other necessary instructions to staff) consistent with the terms of this order. These amendments shall

(a) Set forth the availability of emergency assistance to families with a needy child in the terms set out in (i)-(v) above.

(b) Specify that non-AFDC eligible children are eligible for emergency assistance if they meet the eligibility standards of (i)-(v) above.

(c) Until HEW files regulations under ¶ B-1 below, establishes a definition of the terms "lack of available resources" and "necessary to avoid destitution" which are compatible with providing emergency assistance when a needy child is approaching destitution.

(d) Establish amounts of assistance, forms of payment and types of services to be provided.

(e) Set forth examples of common forms of destitution to be avoided by provision of emergency assistance, including, but not limited to imminent eviction, imminent

termination of utilities, and lack of food, basic clothing and household furnishings.

(f) Set forth examples of common causes of such destitution, including but not limited to fire and other disaster causing homelessness or damage to personal possessions, eviction, theft, abandonment by a parent, delays in awaiting normal processing of AFDC applications, failure to receive AFDC assistance due to administrative error and failure to receive other forms of income.

2. Defendants' submission pursuant to paragraph A. 1 (p. 8) herein shall not define eligibility more narrowly than § 406(e) of the Act and shall be equitable as required by 45 C.F.R. § 233.10(a)(1)(ii).

3. Defendants shall review within 30 days from entry of this order the IDPA hearing decision, No. 73-4155, of March 18, 1974 denying emergency assistance to plaintiff Frances Gallman in the circumstances alleged in this complaint, and shall enter a new decision in compliance with the Court of Appeals' decision and this order. Such decision shall be promptly filed with this court and defendants shall report all further action including payment made with respect to her administrative appeal.

4. In order to assist the parties and this court with further proceedings for compliance the state defendants shall, within 30 days of the entry of this order, commence to register all requests by needy families with children for emergency aid, categorizing such requests by a) type of need, b) cause of need, c) department response, and d) reasons for denial if denial of the request occurs, and shall submit to this court monthly until further order of court the information obtained from such registry.

5. Plaintiffs shall have 7 days after submission of the materials required in paragraph A.1-4 herein in which to file comments or objections.

B. Defendant U.S. Department of Health, Education and Welfare is hereby enjoined from approving state plans for emergency assistance which limit eligibility more narrowly than § 406(e) of the Act or funding an emergency assistance program (however designated) under any provision of the Act other than §§ 406(e) and 403(a)(5). In furtherance of this injunction, H.E.W. is specifically ordered as follows:

1. Within 60 days from entry of this order, it shall file with the court proposed regulations governing emergency assistance, which proposed regulations shall be in accord with the opinion of the Court of Appeals, with this order and with 45 C.F.R. § 233.10(a) (1)(ii)(A).

(a) Plaintiffs shall have 15 days after submission of the proposed regulations in which to comment.

(b) Upon approval by this court and completion of procedures required by law for promulgation of regulations, defendant H.E.W. shall publish the regulations in the Federal Register and Code of Federal Regulations.

2. Within 90 days after submission of Illinois' plan for emergency assistance pursuant to Paragraph A (pp. 7-9) above, H.E.W. shall notify the court and the parties of its action in approving or disapproving the amended plan in accordance with standards set by the Act, this order and the decision of the Court of Appeals.

C. Defendants Illinois Department of Public Aid, Joel Edelman and James L. Trainor, their successors in office, employees, agents and assigns are enjoined from failing to ensure that emergency assistance grants are given forthwith to members of the plaintiff class, and are specifically

directed in furtherance of this injunction to modify their procedures to provide as follows:

1. Caseworkers and necessary supervisory and other staff shall give preference to requests for emergency assistance over all other work assignments. Within 24 hours of a request staff shall verify need, determine eligibility and follow all necessary procedures to secure issuance of the emergency assistance payment, whether by disbursing order or check. This time period may not be extended except—

(a) for the time attributable to delay caused by an applicant's failure to provide essential information within his or her understanding and immediate control, or

(b) by waiver signed by the applicant for emergency aid.

Delay based upon an applicant's fault in (a) above shall be clearly described in the applicant's case record maintained by the department. In a case of waiver, the original waiver shall be maintained in the case record and the applicant shall be furnished a copy.

2. An individual requesting emergency assistance shall be advised orally and in writing during the initial interview that if eligible he or she may receive a disbursing order at the local office that day or within 24 hours of the request or, if the client prefers, a check may be mailed from Springfield or Chicago to an address provided by the client.

3. An applicant for emergency assistance not yet regularly receiving AFDC, as well as an applicant for emergency assistance currently receiving AFDC, shall have his or her emergency assistance request acted upon within the time limits of paragraph 1 above.

4. Defendant Trainor shall amend the Department's Categorical Assistance Manual to incorporate paragraphs B 1, 2 and 3 above.

(a) A copy of the amendment shall be submitted to the court not later than 15 days from entry of this order. Plaintiffs may within 10 days thereafter file comments in response thereto.

(b) Defendants shall distribute the bulletin or amendment to casework staff within 10 working days after receipt of the court's approval of it.

(c) The amendment issued in compliance with this order shall be filed with the court and shall not be modified or in any way changed without obtaining leave of court beforehand.

5. For each month beginning with the first month following entry of this order and continuing thereafter until further order of the court, defendants shall report their compliance with this order in a form substantially similar to defendants' reports of June (undated) and September 18, 1975, with additional information showing the cause for any delay greater than 24 hours from the time of request until a disbursing order or check is ready for delivery.

D. Defendant Trainor is further ordered to give notice to class members by the following methods:

1. In the next regular mailing for AFDC warrants, defendants shall enclose a notice setting out in easily understandable language the changes in emergency assistance effected by this order.

2. Within 60 days of entry of this order, defendant shall cause to be prominently displayed in all public areas

of each public aid office in Illinois a poster describing in easily understandable language the material terms of this order.

3. The notice described in paragraph 1 and the poster described in paragraph 2 shall describe the type of need and possible circumstances under which emergency assistance is available and the conditions of eligibility for the program.

E. This order and compliance with this order shall not be interpreted as altering or in any manner affecting other obligations defendants have with respect to providing prompt assistance to AFDC applicants and recipients and/or providing emergency assistance to AFDC applicants and recipients pursuant to other judgments rendered prior to the date of this order or pursuant to state law.

F. This judgment shall be binding on defendants, their officers, agents, attorneys, servants, employees and their successors, and upon those persons in active concert or participation with them who receive actual notice of the judgment by personal service or otherwise.

G. This court shall retain continuing jurisdiction over this cause for purposes of enforcement.

H. Plaintiffs are awarded their costs in this matter.

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Thomas R. McMillen,
United States District Judge

Date: .....